

IN THE MICHIGAN SUPREME COURT

**Appeal from the Michigan Court of Appeals
Gleicher, PJ, and Cavanagh and Fort Hood, JJ**

IN RE HICKS/BROWN MINORS

Supreme Court No. 153786
Court of Appeals No. 328870
Circuit Court No. 12-506605-NA

**APPELLEE-MOTHER'S SUPPLEMENTAL BRIEF
ORAL ARGUMENT REQUESTED**

Vivek S. Sankaran (P68538)
Joshua B. Kay (P72324)
Child Welfare Appellate Clinic
Attorneys for Appellee-Mother
University of Michigan Law School
701 S. State St., 2023 South Hall
Ann Arbor, MI 48109-3091
(734) 763-5000
vss@umich.edu

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INTRODUCTION

The Court of Appeals correctly reversed the order terminating Shawanda Brown's parental rights because the Department of Health and Human Services ("DHHS") failed to make reasonable efforts to reunify Ms. Brown, a parent with a cognitive disability, with her two children.¹

When DHHS removes children from their parents, it has a statutory obligation to make reasonable efforts to reunify the family. MCL 712A.19a. To fulfill this obligation, within thirty days of removal, DHHS must assess a family's needs, design a case service plan to address those specific needs, and then implement the plan accordingly. MCL 712A.13a(10); MCL 712A.18f(1)(2); Mich

¹ Nationally, child welfare agencies have struggled to comply with legal obligations that require them to meet the needs of parents with disabilities. According to a 2012 report from the National Council on Disability, parents with disabilities are "overly, and often inappropriately, referred to child welfare services, and once involved, are permanently separated at disproportionately high rates." National Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, at 18, 242 (2012), available at www.ncd.gov/publications/2012/Sep272012/. Among parents with disabilities, parents with intellectual disabilities "face the most discrimination based on stereotypes, lack of individualized assessments, and failure to provide needed services." US Department of Health and Human Services and US Department of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, at 2, Attachment A. As a result of widespread noncompliance with the law, in 2015, the Departments of Justice and Health and Human Services issued a technical assistance memorandum to guide child welfare agencies and courts, a copy of which is attached to this brief as Attachment A.

Admin Code, R 400.12419(d)(e). After creating the initial service plan, DHHS must review it every 90 days and must modify the plan to ensure that it continues to address the family's needs. MCL 712A.18f(5); Mich Admin Code, R 400.12418(2)(b); Mich Admin Code, R 400.12420(1)(e).

Where DHHS knows that a parent has a disability, the Americans with Disabilities Act ("ADA"), 42 USC 12101 *et seq.*, requires the department to design a service plan that reasonably accommodates the parent's disability to ensure that parents receive 1) individualized treatment and 2) a full and equal opportunity to participate in services, which might require the provision of different or additional services. 42 USC 12132; 28 CFR 35.130(b). If DHHS fails to do this, "then it cannot be found that reasonable efforts were made to reunite the family." *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000). And where DHHS has failed to make reasonable efforts to reunify, this Court has consistently held that a court cannot terminate that parent's rights because there is a "hole in the evidence" as to whether the parent can safely care for her children. See *In re Mason*, 486 Mich 142, 160; 782 NW2d 747 (2010); *In re Rood*, 483 Mich 73, 127; 763 NW2d 587 (2009) (YOUNG, J., concurring).

This is precisely what happened in this case. Not only did DHHS have actual knowledge from the outset of the case that Ms. Brown suffered from a cognitive disability, her attorney specifically requested specialized services to accommodate her disability at six different hearings. Yet, despite this information, DHHS did little to accommodate Ms. Brown's disability when making its reunification efforts.

It failed to create a service plan for the first nine months of the case and ignored its own evaluations, which recommended specialized services for Ms. Brown. Instead, the agency prescribed the same, cookie-cutter, services it requires of all parents. Then it sought to terminate Ms. Brown's parental rights when she failed to show benefit from services that did not accommodate her disability. Because DHHS failed to make reasonable efforts, it created a "hole in the evidence," and the trial court committed reversible error when it terminated Ms. Brown's parental rights.

The Court of Appeals correctly applied existing law in reaching its decision. This Court should either deny the Application for Leave to Appeal or affirm the Court of Appeals' decision.

STATEMENT OF QUESTIONS PRESENTED

- A. Whether the Americans with Disabilities Act required DHHS to design a service plan that reasonably accommodated Ms. Brown's disability when DHHS had actual knowledge of her cognitive disability and when Ms. Brown's attorney had requested that DHHS offer Ms. Brown specialized services to accommodate her disability at six hearings?

L-GAL says no.

Ms. Brown says yes.

Court of Appeals says yes.

- B. Whether DHHS failed to make reasonable efforts to reunify by failing to provide services accommodating Ms. Brown's known disabilities?

L-GAL says no.

Ms. Brown says yes.

Court of Appeals says yes.

- C. Whether the Juvenile Code permits a trial court to terminate a parent's rights even where DHHS has failed to make reasonable efforts to reunify?

L-GAL says yes.

Ms. Brown says no.

Court of Appeals says no.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Shawanda Brown is a parent with a cognitive disability.

Shawanda Brown is a young mother of two children – Destiny and Elijah – who has a cognitive disability. Ms. Brown has a Full Scale IQ of 70, placing her in the second percentile and “within [the] borderline range of intellectual functioning.” Juvenile Assessment Center Psychological Report, 5/9/13 at 2, Attachment B. In other words, her critical thinking and reasoning abilities only “exceed those of 2% of her peers.” *Id.* Additionally, her Working Memory Index score of 69 “places her in the extremely low range” of ability to retain and recall information. *Id.* at 3. She also displays “moderate to severe” cognitive performance problems. Functional Assessment Rating of Mother, 4/10/13 at 1-2. As a result, Ms. Brown is “limited in her ability to independently manage more complex activities of daily living” and struggles with her judgment and decision-making. Juvenile Assessment Center Psychological Report, 5/9/13 at 3.

Ms. Brown asks DHHS to care for Destiny because she is overwhelmed, and the trial court adopts a standard service plan.

In April 2012, DHHS petitioned for jurisdiction of Destiny after Ms. Brown brought Destiny to the agency stating that she could no longer care for her. 1/28/13 Tr. at 11. Ms. Brown lacked housing and money and felt “overwhelmed.” *Id.* Immediately, the DHHS worker learned that Ms. Brown had mental health issues. *Id.* at 18. Yet despite these issues, there were no signs that Ms. Brown had neglected Destiny in any way. According to the worker, when Ms. Brown brought Destiny to the agency, Destiny looked “fine,” was “neat and clean,” and came with a

diaper bag. *Id.* at 19. Additionally, the worker observed that Destiny “didn’t appear to be malnourished,” and “didn’t have any scratches, burns, bruises or marks.” *Id.* at 19. In fact, the worker spent four hours “trying to convince [Ms. Brown] to keep Destiny.” 4/25/12 Tr. at 7, 12.

Because Ms. Brown stated that she was unable to care for Destiny, DHHS requested – and received – an order allowing it to immediately place Destiny in foster care. Order to Take Child Into Protective Custody, 4/10/12. In its order, the court specifically noted that Ms. Brown had “apparent limitations” that prevented her for caring for her daughter. *Id.*

On April 11, 2012, the court held a preliminary hearing at which it continued Destiny’s placement in foster care. Order After Preliminary Hearing, 4/11/12. After the hearing, DHHS filed an amended petition in which it noted that Ms. Brown “displayed abnormal behavior that presented concerns that she may have some untreated mental health issues.” Amended Petition, 4/18/12.

Ms. Brown requested an adjudication trial on the allegations in the petition. But the court did not hold a trial for nine months. Order of Adjudication, 1/28/13.² During this lengthy delay, DHHS did not create a service plan, nor did it provide

² The court rules require trial courts to hold the adjudication trial within 63 days of removal. Exceptions to this rule include a stipulation for good cause, the failure to complete service or the unavailability of a witness. MCR 3.972. No such exception applied in this case.

services to Ms. Brown.³ 11/15/12 Tr. at 9; 1/28/13 Tr. at 26-27. Ms. Brown wanted to voluntarily engage in parenting classes right away. See 11/15/12 Tr. at 9. But the court refused to order the agency to provide any services despite Ms. Brown's request, explaining, "I actually did order that once, and the Court of Appeals used it to beat me over the head with . . . I got beat over the head once. I don't think I'm going to get beat over the head a second time." *Id.* at 9-10. So DHHS did not provide her with services.

Ms. Brown also did not see Destiny for approximately seven months during this lengthy delay. 1/12/13 Tr. at 27 (testifying that Ms. Brown visited Destiny for the first time on December 12, 2012). Yet from the beginning of the case, Ms. Brown had been trying to set up visits with Destiny. 4/25/12 Tr. at 10, 15. A DHHS worker explained that Ms. Brown's foster care worker from Lutheran Services should have helped facilitate visits and agreed to look into why visits had not been arranged. *Id.* Meanwhile, Ms. Brown showed interest in seeing Destiny, and even called Lutheran Services repeatedly. See 5/7/12 Tr. at 10; 1/28/13 Tr. at 26 (foster care worker testifying to multiple calls). But Ms. Brown's efforts were unsuccessful. Later, without explaining what had happened, a DHHS petition simply alleged that Ms. Brown failed to visit Destiny during the first eight months of the case. Petition, 6/4/15. After these long delays in visits, Ms. Brown requested a makeup visit. In response, the court advised, "It's a government agency. They're not going to find

³ The Juvenile Code requires DHHS to create a service plan within 30 days of a child's removal from the home. MCL 712A.13a(10)(a). DHHS failed to create a service plan until nine months after Destiny's removal.

you, you've got to kind of get to them, ok?" 5/7/12 Tr. at 11-12. But later, the court conceded that "there were delays and provisions of services that are not chargeable to the mom." 1/15/14 Tr. at 18.

On January 28, 2013, the court finally held an adjudication trial and took jurisdiction of Destiny. Order of Adjudication, 1/28/13 at 1.

The next day, the court held a dispositional hearing. Order of Disposition, 1/29/13. After reviewing the DHHS service plan but without the benefit of a psychological or psychiatric evaluation, the court ordered Ms. Brown to participate in standard services. The court required Ms. Brown to attend and to benefit from parenting classes, to participate in individual counseling, to visit Destiny under supervision, to regularly contact her worker, to complete a GED course and test, to find suitable housing, to obtain a legal source of income, to attend a psychological assessment at a clinic, and to receive prenatal care because Ms. Brown was pregnant. *Id.* at 5. The court also ordered DHHS to help Ms. Brown secure housing and to provide Ms. Brown with bus tickets so that she could get to her services. *Id.* at 5. Despite DHHS' acknowledgment of Ms. Brown's mental health issues, further revealed by its requirements in its service plan that Ms. Brown "obtain the intellectual capacity to fully be able to care for herself and her daughter," its plan did not provide any specialized services to accommodate her disability. Parent Agency Treatment Plan, 1/28/13 at 5.

On February 7, 2013, Ms. Brown gave birth to her second child, Elijah. Two days later, DHHS placed Elijah in foster care and petitioned the court for

jurisdiction, alleging that the conditions that led to Ms. Brown's first case still persisted and indicating concerns about Ms. Brown's cognitive ability to care for her children. Petition as to Elijah Brown, 2/13/13. At Elijah's preliminary hearing, the DHHS worker once again acknowledged that Ms. Brown had a "cognitive impairment" and an untreated mental illness. 2/13/13 Tr. At 7. Based on this testimony, the court continued Elijah's placement in foster care, noting that Ms. Brown had not rectified her "mental health issues." Order After Preliminary Hearing dated 2/13/13.

The court took jurisdiction of Elijah on February 26, 2013 after Ms. Brown entered a plea that she still lacked stable housing. 4/9/13 Tr. at 5, 9, 17. That same day, the court held a dispositional hearing. Order of Disposition, 4/9/13. The court adopted DHHS' initial service plan as to Elijah, continuing the same services proposed in Destiny's case, but adding psychiatric services. *Id.* at 18-19; Initial Service Plan as to Elijah, 3/16/13. Again, DHHS noted that Ms. Brown needed to "obtain the intellectual capacity to fully be able to care for herself and her children." Parent Agency Treatment Plan, 3/16/13 at 5.

DHHS does not provide specialized services to accommodate Ms. Brown's disability

Over the next few years, the trial court held fifteen additional hearings,⁴ during which Ms. Brown's cognitive disability remained apparent.

⁴ Hearings were held on the following dates: 8/29/12; 10/16/12; 11/15/12; 4/23/13; 7/23/13; 10/15/13; 1/15/14; 2/13/14; 5/13/14; 8/13/14; 11/7/14; 11/26/14; 2/20/15; 5/20/15; 6/18/15.

Several evaluations requested by DHHS after it created its service plan documented the challenges faced by Ms. Brown due to her disability. A functional assessment of Ms. Brown concluded that she suffered from a “moderate to severe cognitive performance problem” which impaired her judgment. Functional Assessment Rating, 4/10/13 at 2. A psychological evaluation reached similar conclusions. The psychologist conducting the evaluation “immediately observed cognitive deficits,” and subsequent testing revealed that Ms. Brown had a full-scale IQ of 70, placing her in the second percentile and within the borderline range of intellectual functioning. Juvenile Assessment Center Psychological Report, 5/9/13 at 2. Based on the testing and these observations, the evaluator concluded that Ms. Brown “may be limited in her ability to independently manage more complex activities of daily living” and needed specialized services. *Id.* at 3. Thus, the evaluation recommended that DHHS provide behavioral therapy and parenting classes that utilized in-session role-playing, and asked DHHS to administer measures of adaptive functioning to determine Ms. Brown’s specific strengths and weakness with regards to activities of daily living. *Id.* at 4. Building on these recommendations, a psychiatric evaluation recommended that Ms. Brown receive case management services through a community mental health agency, like the Neighborhood Services Organization (“NSO”) or Community Link Inc., which assisted individuals with developmental disabilities. Juvenile Assessment Center Psychiatric Evaluation, 5/30/13 at 4, Attachment C. A third report indicated that Ms. Brown “could benefit [from] intensive services as evidence[d] by the client

needing more time and support to complete treatment goals.” Juvenile Assessment Center Court Report, 10/15/13 at 3.

Those working with Ms. Brown confirmed the findings made in the evaluations. The court noted her low IQ at a review hearing. 10/15/13 Tr. at 6. Her therapist “immediately observed [Ms. Brown’s] cognitive deficits.” Functional Assessment Rating of Mother, 4/10/13 at 1. A DHHS worker observed that Ms. Brown “appears to have some intellectual impairments” such as “a hard time completing simple tasks,” “difficulties in making decisions,” and trouble “understanding complex terms.” Initial Service Plan as to Elijah Brown, 3/16/13 at 6. A private foster care worker also recognized that Ms. Brown had a learning disability, 7/27/15 Tr. at 37, needed help “doing what is necessary,” *id.*, and struggled with reading and writing. 8/13/14 Tr. at 10; 11/7/14 Tr. at 12.

Despite DHHS’ knowledge of Ms. Brown’s cognitive impairment and her need for accommodations, DHHS did not provide her with the specialized services recommended in her evaluations. It did not provide her with behavioral therapy or a specialized parenting program that utilized role-playing. It did not provide her with a measure of adaptive functioning, nor did it arrange for her to obtain case management from a community mental health organization that works with individuals with developmental disabilities.

Instead, DHHS offered Ms. Brown a revolving door of caseworkers and service providers who provided her with a standard array of services. More than seven workers from both DHHS and a private foster care service provider, Lutheran

Services, were assigned to Ms. Brown's case. Ms. Brown also experienced discontinuity with her other service providers. For example, one therapist worked with Ms. Brown during most of her case. But that therapist suddenly took a medical leave, and Ms. Brown experienced a month long delay in her weekly therapy appointments. 5/20/15 Tr. at 7. Similarly, Ms. Brown experienced problems with her parenting classes. Although the service provider initially terminated Ms. Brown because of some confusion, Updated Court Report, 10/15/13 at 4, after a DHHS worker made another referral, Ms. Brown was terminated again "through no fault of her own...[because she was] transferred to a new service provider." 10/15/13 Tr. at 6. Prior to being terminated and transferred, Ms. Brown had already completed six out of seven sessions. Updated Court Report, 10/15/13 at 4.

These frequent changes caused confusion. For example, early in the case, Ms. Brown did not know who her foster care worker was. When Ms. Brown's attorney asked for the worker's name, the DHHS worker answered "The same worker--I don't recall his name... The same gentleman, I gave you the name and the number when Shawanda needed bus tickets." 10/16/12 Tr. at 8-9. Ms. Brown's attorney clarified that she had spoken to a woman previously. *Id.* The DHHS worker speculated, "That's probably from Lutheran . . . but the one in our office, or that's probably from whoever else; the other half. From our office it's a male, and I can't pronounce his name. I know who he is and I know exactly where he sits. So

call me and I'll get you that." *Id.* In this way, Ms. Brown struggled to find much needed continuity and consistent communication from her service providers.

Ms. Brown largely complies with standard services, but struggles to show consistent benefit.

Despite challenges posed by delays and discontinuity, Ms. Brown substantially completed her service plan. Nonetheless, she struggled to show consistent benefit from services that failed to address her cognitive disability. Although a foster care worker testified that Ms. Brown cancelled "here and there," 7/27/15 Tr. at 19, the record indicates she regularly visited her children. 1/28/13 Tr. at 34-36. During visits, Ms. Brown improved "in engaging her children." Juvenile Assessment Center Court Report, 10/15/13 at 2; Updated Court Report, 4/23/13 at 5.

Ms. Brown also attended a GED Preparation Course and classes at Wayne County Community College, although she did not take the GED exam.⁵ Updated Court Report, 10/15/13 at 5; Order as to Destiny, 2/13/14 at 1; 5/20/15 Tr. at 12. She attended over 60 therapy sessions and seemed "fully engaged," according to reports filed in court, and her therapist could see a change in her ability to handle her emotions better.⁶ Juvenile Assessment Center Court Report, 10/15/13 at 2; Updated

⁵ During the termination of parental rights hearing, the worker conceded that DHHS had never evaluated Ms. Brown to determine whether she had the cognitive ability to obtain a GED. 7/27/15 Tr. at 38.

⁶ Ms. Brown received therapy from a counselor at Franklin-Wright Settlements, Inc. No evidence was introduced at trial that either the counselor or the organization had specialized training in working with parents with cognitive disabilities. Although the court had ordered the therapist to appear at a hearing, she never showed up. 8/13/14 Tr. at 14; 11/7/14 Tr. at 10, 13; 11/26/14 Tr. at 10 (court

Court Report, 10/15/13 at 4; Juvenile Assessment Center Court Report, 1/15/14, at 2; Updated Court Report, 1/15/14 at 4; Juvenile Assessment Center Court Report, 11/17/15 at 1; 7/27/15 Tr. at 25. But the caseworker was “not sure” if the therapist had ever discussed or addressed Ms. Brown’s actual abilities and disabilities.

8/13/14 Tr. at 11. Ms. Brown also completed her parenting class, at which she was able to provide appropriate feedback regarding the material discussed. Juvenile Assessment Center Court Report, 1/15/14 at 2; Parenting Education Program Certificate, 1/16/14; 7/27/15 Tr. at 10. And by the end of the case, she had obtained housing, living with her grandmother who was also willing to allow the children in the home so long as Ms. Brown cared for them. 11/7/14 Tr. at 4-6; Updated Court Report, 11/7/14 at 3; 7/27/15 Tr. at 4.

Due to Ms. Brown’s efforts, the court found on several occasions that she indeed had made progress. Permanency Planning Hearing Order, 1/29/13; Order Following PPH as to Elijah, 2/26/13; Order Following Dispositional Review Hearing, 2/13/14; Order Following Dispositional Review Hearing as to Destiny, 8/13/14.

Still, at times, Ms. Brown struggled to show benefit from services that did not address her disability. Her foster care worker reported that Ms. Brown seemed hesitant and needed frequent redirection during visits, leaving Destiny’s dirty diaper unattended on one occasion, 1/28/13 Tr. at 30, 43, and not holding Destiny’s hand near traffic on another. 7/27/15 Tr. at 11. At times the court complained,

remarking, “regardless of what the therapist told me it’s not going to make much difference to my analysis.”).

“Mother just does not seem to be able to apply what she’s been learning,” and “[s]o, I don’t know if it’s a mental health issue or it’s a lack of motivation or a combination of both. But mother has to take some initiative in this.” 2/13/14 Tr. at 10.

As a result, the trial court frequently urged her to make more progress quickly. During a dispositional hearing, the court remarked on Ms. Brown only having a ninth grade education, saying, “Ninth grade. Mom, that’s bad. However if you focus on school through a GED program you could probably get a GED in a year . . . Mom, you’d then be somebody.” 1/29/13 Tr. at 5. The court further advised, “Harry Potter’s not going to come along and tap you with a wand to make these things happen. You have to make them happen” and warned “if you’re not making a lot of progress quickly, you’re going to . . . likely get terminated.” *Id.* at 7, 8.

Although the foster care worker testified to Ms. Brown’s “childlike demeanor,” 7/27/15 Tr. at 29-30, the court insisted, “I really don’t think workers should be in the business of taking parents by the hand . . . In terms of treating them like children they’re not supposed to do that because we’re not dealing with children here.” 8/13/14 Tr. at 16. The court concluded, “I’m not a bully. I don’t like trying to motivate people by scaring them. But . . . I am trying to scare mom. You know, she’s across the tracks and there is a freight train coming at her.” 1/15/14 Tr. at 19-20.

Ms. Brown’s attorney reminds DHHS and the court of the need to provide specialized services to accommodate Ms. Brown’s disability.

Recognizing that DHHS was failing to implement the recommendations made by its own evaluators to address Ms. Brown’s cognitive needs, her attorney

extensively inquired about more intensive services during at least six different hearings. 8/13/14 Tr. at 7-11; 11/7/14 Tr. at 11-12, 15; 11/26/14 Tr. at 7-8; 2/20/15 Tr. at 10-13; 5/20/15 Tr. at 9-11; 7/27/15 Tr. at 39. In January 2014, she asked a foster care worker from Wellspring Lutheran Services about one-on-one parenting help and an incremental health program. 1/15/2014 Tr. at 13-14. But DHHS never provided these specialized services, and the court never ordered them.

In August 2014, Ms. Brown's attorney continued to raise concerns that the service plan did not account for her client's needs.⁷ 8/13/14 Tr. at 7. Counsel asked the worker about Ms. Brown's disabilities, and the worker confirmed that Ms. Brown indeed suffered from cognitive disabilities. 8/13/14 Tr. at 10. Still, when counsel asked about necessary assessments for these disabilities, the worker seemed flummoxed, testifying, "the last thing that I know was needed was basically an assessment, like some type of psychological assessment, so I thought that we were getting that from the therapist because I don't have any." *Id.* at 7.

Still, the court overlooked this testimony about Ms. Brown's disabilities and DHHS' failure to address them. Instead, the court remarked, "Frankly, I know what's going to happen at the 17 month point . . . It's either going to be guardianship or it's going to be adoption." *Id.* at 5. Still, at counsel's urging, the

⁷ Ms. Brown and the court briefly discussed referring Ms. Brown to a specialized Baby Court docket." 1/15/14 Tr. at 14. But that never happened.

court referred Ms. Brown to NSO, a community-based organization serving individuals with disabilities,⁸ quipping, “whatever that is.” *Id.* at 15.

Despite counsel’s efforts, DHHS’ pursuit of specialized services never materialized, and the NSO referral fell into limbo. Although NSO services were mentioned in a psychiatric evaluation requested by DHHS, DHHS did not pursue NSO services until the court referred Ms. Brown in August 2014. *Id.* at 13; Juvenile Assessment Center Psychiatric Evaluation, 5/30/13 at 4. Several months after the court ordered the NSO referral, DHHS finally filed the paperwork only to be told that the NSO application process had changed. 2/20/15 Tr. at 10-11. Then, a worker from NSO forwarded the new paperwork, but the foster care worker stated that NSO needed at least four weeks before it would process the paperwork. *Id.* at 11.

Ultimately, the NSO referral languished and Ms. Brown never received the service. First, the foster care worker explained that NSO administrators never got the paperwork for an appropriate transfer of services. 11/7/14 Tr. at 11. Later, she testified that Ms. Brown was already eligible for disability services, without a transfer to NSO, through another agency – Northeast Guidance – at which Ms. Brown was already receiving medication and psychiatric assistance. 5/20/15 Tr. at 10. The foster care worker testified, “[T]hey are like duplicate services. They

⁸ Neighborhood Services Organization (NSO) provides mental health and developmental disability services, permanent supportive housing, and employment services for individuals like Ms. Brown who suffer from a disability. For more information, see <http://www.nso-mi.org>.

provide some of the same things. So she's already a client there. So it would make more sense to just go ahead and start her up with the developmental disability services through them so we wouldn't have to go through this [transfer] process." *Id.* at 10. Yet the foster care worker instead pursued a transfer to NSO services anyway for no stated reason. Nevertheless, NSO ultimately denied Ms. Brown's application because she was already using a service provider that could offer disability services. 7/27/15 Tr. at 39-40. As a result, Ms. Brown never received any specialized disability services through any of the community-based service providers. Still, the court surmised that "mom has perpetually wanted other people to do the work that she has to do," and "[w]e've tried everything. The only thing that's left is adoption." 2/20/15 Tr. at 16, 18.

While Ms. Brown waited for community-based services from a provider serving individuals with disabilities, her standard service providers reported that she no longer showed progress. Updated Court Report, 11/7/14; Juvenile Assessment Center Court Report, 11/17/14. The court advised, "Mom, there are times when it comes down to crunch time where anything other than results is not acceptable." 11/26/14 Tr. at 13.

The trial court terminates Ms. Brown's parental rights.

On June 4, 2015, Yasmin Gibson, Ms. Brown's foster care worker, petitioned the court to terminate Ms. Brown's parental rights. Petition, 6/4/15. On July 27, 2015, the trial court held a termination of parental rights hearing, at which only one witness – Ms. Gibson – testified. Ms. Brown appeared at the hearing via

telephone, because she had just moved to Cleveland, OH, to live with her grandmother. 7/27/15 Tr. at 4.

At the hearing, Ms. Brown's attorney again reminded the court of her client's disability. She cross-examined the worker, who testified, "I believe that, um, she is just borderline range of cognitive functioning. So I do believe it has been said in reports that she does need, you know, things to aid her in doing what is necessary." *Id.* at 37. Counsel reminded the court that Ms. Brown had "limitations" and needed specialized assistance, arguing that Ms. Brown never received the necessary intensive services and noting that "reasonable efforts have not been made" and that she had raised the issue of disability services "several times at several different hearings." *Id.* at 57-58.

DHHS did not present any evidence demonstrating that it had offered specialized services to assist Ms. Brown to safely parent her children. Instead the caseworker admitted that she had failed to arrange for Ms. Brown to receive developmental disability services through a community-based organization, *id.* at 39-41, never arranged specialized parenting classes for her, *id.* at 44, and was "not sure" whether DHHS had ever evaluated Ms. Brown to see whether she had the cognitive ability to pass a GED test. *Id.* at 38.

Counsel's efforts proved futile. The court terminated Ms. Brown's parental rights under MCL 712A.19b(3)(c)(i) and MCL 712A.19b(3)(g). The court concluded, "Yes, I believe she has some cognitive delays, but she's just totally unmotivated." *Id.* at 64. The court added, "I've used just about my entire toolbox on this mom.

Everything that's relevant to try and move her towards becoming somebody." *Id.* at 65. The court did not otherwise mention Ms. Brown's disability or specify how DHHS had provided accommodations for her disability.

Ms. Brown appealed the decision to the Court of Appeals. In a published decision, the Court of Appeals unanimously reversed the trial court's order. *In re Hicks/Brown*, __ Mich App __; __ NW2d __ (2016) (Docket No. 328870). The Court of Appeals found that "though DHHS was well aware of respondent's special needs, the case services plan never included reasonable accommodations to provide respondent a meaningful opportunity to benefit." *Id.* at __, slip op at 1. Thus, "absent such accommodations, the DHHS failed in its statutory duty to make reasonable efforts" and because it failed to do so, it "lacked clear and convincing evidence to support the statutory grounds cited in the termination petition." *Id.*

ARGUMENT

A. BECAUSE DHHS KNEW THAT MS. BROWN HAD A COGNITIVE DISABILITY AND REQUIRED ACCOMMODATIONS, IT WAS LEGALLY OBLIGATED TO CREATE A SERVICE PLAN THAT ACCOMMODATED HER DISABILITY.

Standard of Review

Whether the law required DHHS to create a service plan that accommodated Ms. Brown's disabilities is a question of law that this Court reviews de novo. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

Argument

1. DHHS Has An Affirmative Responsibility To Provide Services That Address The Family's Needs

When DHHS knows that a parent has a disability and requires accommodations, both the Juvenile Code and the Americans with Disabilities Act require DHHS to design a service plan that accommodates that parent's specific disability.⁹ DHHS' obligation to design a service plan stems from the requirement that it make reasonable efforts to reunify children with their parents. MCL 712A.19a(2).¹⁰ To make reasonable efforts, DHHS must prepare a case service plan

⁹ The Juvenile Code details specific situations in which DHHS need not make reasonable efforts to reunify because of a parent's egregious conduct. MCL 712A.19a(2)(a); MCL 722.638. None of these exceptions apply in this case.

¹⁰ The requirements in the Juvenile Code that DHHS make reasonable efforts to reunify stem from federal law. In order to receive federal child welfare funds under Title IV-E of the Social Security Act, DHHS must make reasonable efforts to reunify families. 42 USC 671(a)(15)(B). To do so, it must create a service plan that includes "services . . . to the parents, child and foster parents in order to improve the conditions in the parents' home [and] facilitate return of the child to his own safe

detailing “[e]fforts to be made by the agency to return the child to his or her home” and a “[s]chedule of services to be provided to the parent, child, and if the child is to be placed in foster care, the foster parent, to facilitate the child's return to his or her home.” MCL 712A.18f(3)(c)(d). It must develop the plan within 30 days of a child’s removal from her home and then update it every 90 days thereafter. MCL 712A.13a(10); MCL 712A.18f(5); Mich Admin Code, R 400.12418(2)(b).

When creating the service plan, DHHS bears an affirmative responsibility to “ensure that appropriate services are provided.” *Rood*, 483 Mich at 104; MCL 712A.18f(3)(c)(requiring DHHS to document the services it will provide to reunify the family). To do so, DHHS must assess “all persons in the child’s family to determine the services best suited to meet the child’s needs.” Mich Admin Code, R 400.12419(1)(d). The services it provides must be “tailored to meet each client’s needs and to recognize the unique aspects of each case.” Michigan Dep’t of Health and Human Services, *Services Requirements Manual*, 101 at 2 (2015).¹¹

DHHS concedes that it bears this obligation. Its own Foster Care Policy Manual details the specific steps that caseworkers must take in every case to develop an individualized service plan. Michigan Dep’t of Health and Human Services, *Children’s Foster Care Manual*, 722-06. The worker must review all prior records of the family. *Id.* at 3. She must engage the family to assess strengths and

home.” 42 USC 675(1)(B); see also 45 CFR 1356.21(g)(detailing additional service plan requirements).

¹¹ DHHS’ policy manuals are available at <http://www.mfia.state.mi.us/olmweb/ex/html/>.

weaknesses and to ensure that the plan is “[s]pecific to the individual needs of the family.” *Id.* at 3-4. Then she must put services into place as quickly as possible, but no later than 30 days after removal. *Id.* at 16. These services may include parenting classes, mental health services, day care, drug and alcohol abuse counseling, or emergency financial assistance. *Id.* at 10-11. Once services are identified, the worker must the assess the effectiveness of the services on an ongoing basis to determine whether the parents are benefitting from the services and whether services must be adjusted to meet the family’s needs. *Id.* at 16. Where DHHS fails to draft an adequate service plan, “the agreement's inadequacies are properly attributable to the agency.” *In re JK*, 468 Mich 202, 214, n 20; 661 NW2d 216 (2003). These requirements make it clear that DHHS has an affirmative and ongoing obligation to assess a parent’s needs and to develop a service plan to address those specific needs to enable the parent to safely care for her child.

2. Where DHHS Knows That A Parent Has A Disability, It Must Offer Services That Reasonably Accommodate The Parent’s Disability.

Where DHHS knows that a parent has a disability, to fulfill its reasonable efforts obligation,¹² it must offer services that reasonably accommodate the parent’s disability and provide the parent with the opportunity to benefit, as required by the

¹² DHHS itself has recognized that its services must reasonably accommodate disability, explicitly recognizing the authority of the Americans with Disabilities Act. Michigan Dep’t of Health and Human Services, *Children’s Foster Care Manual*, 722-06F (Special Accommodations).

Americans with Disabilities Act.¹³ *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000). Congress passed the ADA to combat discrimination against persons with disabilities, “most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect.” *Alexander v Choate*, 469 US 287, 295; 105 S Ct 712; 83 L Ed 2d 661 (1985).¹⁴ To remedy this, Title II of the ADA prevents public agencies from either excluding individuals with a disability from participating in or deriving benefit from services, programs, or activities of a public entity. 42 USC 12132. This provision applies to the activities and services provided by state and local governmental agencies and covers situations where public agencies contract with private providers. 42 USC 12131(1)(A)(B); 28 CFR 35.130(b)(1).

¹³ Courts across the country have held that a child welfare agency must accommodate a parent’s disability when creating a service plan. See *State ex rel KC v State*, 362 P3d 1248, 1252; 2015 UT 92; (Utah 2015) (“To the extent the government is providing services aimed at reunification, we have no doubt that the ADA applies.”); *People ex rel CZ*, 360 P3d 228, 234; 2015 COA 87 (Ct App Co 2015) (noting that the ADA “applies to the provision of assessments, treatment, and others services that a department provides to parents through a dependency and neglect proceeding prior to a termination hearing.”); *In re Custody & Guardianship of La’Asia S*, 191 Misc 2d 28, 43; 739 NYS2d 898 (Fam Ct NY 2002) (“The court . . . will look to the ADA for guidance in evaluating the agency’s efforts in this case.”); *Adoption of Gregory*, 747 NE2d 120, 126; 434 Mass 117 (Mass 2001) (noting that the ADA requires “the department to accommodate the parents’ special needs in its provisions of services” prior to a termination proceeding); *In re Welfare of AJR*; 896 P2d 1298, 1302; 78 Wash App 222 (Ct App Wa 1995) (noting that the ADA requires the state “to make reasonable accommodations to allow the disabled person to receive the services.”).

¹⁴ This case was decided under the Rehabilitation Act of 1973, the protections of which are expressly extended by the ADA. 28 CFR § 35.103.

Pursuant to the ADA, a public agency may not engage in practices that either discriminate on the basis of disability or have the effect of impairing the accomplishment of the agency's goals for persons with disabilities. 28 CFR 35.130(b)(3). To fulfill this statutory obligation, agencies must provide individualized treatment to people with disabilities and must provide those individuals the opportunity to benefit from or participate in programs that are equal to those extended to individuals without disabilities. 28 CFR 35.130(b); 45 CFR 84.4(b)(1)(ii-iii). This, in turn, may require the agency to adapt services to meet the needs of the individual with disabilities or make changes in policies, practices, and procedures to reasonably accommodate those needs. 28 CFR 35.130(b)(7); 45 CFR 84.22(a).

Recently, the United States Departments of Justice and Health and Human Services issued technical assistance guidelines to child welfare agencies and courts on the types of reasonable accommodations that must be provided to parents with disabilities.¹⁵ See US Department of Health and Human Services and US

¹⁵ State appellate courts have also discussed the types of accommodations child welfare agencies must provide parents. For instance, a New York appellate court found that the child welfare agency had failed to make reasonable efforts where it did not provide specialized services to a parent with cognitive disabilities. *In the Matter of L Children*, 131 Misc 2d 81, 88; 499 NYS2d 587 (NY Fam Ct 1986). Similarly, a California appellate court found that the agency failed to make reasonable efforts for a parent whose intellectual disability "should have been apparent to those assessing the suitability of services offered to her" but was not considered in developing her service plan. *In re Victoria M*, 207 Cal App 3d 1317, 1329; 255 Cal Rptr 498 (Cal 1989). There, the mother had an IQ of 72, in the borderline range of intelligence. *Id.* at 1322. In light of her limitations, the cookie-cutter services provided were insufficient. *Id.* at 1330. The court noted that "failure is inevitable" if "generic services are offered to a parent suffering from a mental

Department of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, Attachment A. Citing a report by the National Council on Disability, the report noted that “parents with intellectual disabilities and parents with psychiatric disabilities face the most discrimination based on stereotypes, lack of individualized assessments, and failure to provide needed services.” *Id.* at 2. To remedy this, child welfare agencies may have to provide “enhanced or supplemental training, increase[d] frequency of training opportunities, [and] training in familiar environments conducive to learning.” *Id.* at 10. For example, when providing training to parents with disabilities, “agencies should consider the individual learning techniques of persons with disabilities and may need to incorporate the use of visual modeling or other individualized techniques to ensure equal opportunity to participate in and benefit from the training.” *Id.* at 15. So “if a child welfare agency provides classes on feeding and bathing children and a mother with an intellectual disability needs a different method of instruction to learn the techniques, the agency should provide the mother with the method of teaching that she needs.” *Id.* at 5. Or child welfare agencies may need to modify training “to allow more frequent, longer, or more meaningful training.” *Id.* at 10. Additionally, to fulfill

incapacity.” *Id.* at 1332. Similarly, the Rhode Island Supreme Court determined that “[e]fforts to encourage and strengthen the parental relationship which are reasonable with respect to an average parent are not necessarily reasonable with respect to an intellectually limited person.” *In re William, Susan, and Joseph*, 448 A2d 1250, 1255 (RI 1982).

this statutory obligation, agencies may need to coordinate with community-based organizations that provide comprehensive services to assist parents with disabilities. *Id.* at 15-16. Thus, at a minimum, the ADA requires service plans to “address the individual’s disability-related needs and the auxiliary aids and services the agency will provide to ensure equal opportunities.” *Id.* at 13.

The legal obligation for a child welfare agency to create a service plan that accommodates an individual’s disabilities is triggered when the agency knows that an individual has a disability and requires an accommodation. As the Fifth Circuit observed, “a plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability.” *Delano-Pyle v Victoria County*, 302 F2d 567, 575 (CA 5, 2002). Nothing “in the disability discrimination statutes even remotely suggests that covered entities have the option of being passive in their approach to disabled individuals as far as the provision of accommodations is concerned.” *Pierce v DC*, 128 F Supp 3d 250, 269 (D DC 2015). Rather, an agency must “act affirmatively to evaluate the programs and services they offer and to ensure that people with disabilities will have meaningful access to those services.” *Id.*

These statutory mandates apply whenever the “disability is obvious or because the individual (or someone else) has informed the entity of the disability,” and the entity knows that an accommodation is necessary to address the individual’s limited ability to engage in services. *Robertson v Las Animas Co Sheriff’s Dep’t*, 500 F3d 1185, 1196-97 (CA 10, 2007). While the agency’s knowledge

may derive from a specific request for an accommodation, it may also “follow from the entity's knowledge of the individual's disability and his need for, or attempt to participate in or receive the benefits of, a certain service.” *Id.* at 1197. So long as the agency has actual knowledge of a person’s disabilities, it is “flawed” to reason that an agency has no obligation to provide accommodations without a specific request. *Chisolm v McManimon*, 275 F3d 315, 330 (CA 3, 2001); *Kiman v New Hampshire Dep’t of Corrections*, 451 F3d 274, 283 (CA 1, 2006) (noting that “sometimes the [person]'s need for an accommodation will be obvious; and in such cases, different rules may apply.”).

The legal significance of the request requirement “is merely to put the entity on notice that the person is disabled.” *Pierce*, 128 F Supp 3d at 270. In other words, the request performs a “signaling function – i.e. it alerts the public entity to the disabled person’s need for an accommodation – and where . . . the disability is obvious and indisputably known to the provider of services, no request is necessary.” *Id.* at 270. So even where no request is made, when a public agency knows that a person is disabled, it has an “affirmative duty to assess the potential accommodation needs” of the individual. *Id.* at 272.

3. DHHS Knew Ms. Brown Had A Cognitive Disability And Needed Specialized Services.

Here, there is no doubt that DHHS knew that Ms. Brown had a disability and required accommodations because of her disability.¹⁶ A functional assessment of Ms. Brown concluded that she suffered from a “moderate to severe cognitive performance problem” which impaired her judgment. Functional Assessment Rating, 4/10/13 at 2. A psychological evaluation reached similar conclusions. The psychologist conducting the evaluation “immediately observed cognitive deficits,” and subsequent testing revealed that Ms. Brown had a full-scale IQ of 70, placing her in the second percentile and within the borderline range of intellectual functioning. Juvenile Assessment Center Psychological Report, 5/9/13 at 2. Based on the testing and these observations, the evaluator concluded that Ms. Brown “may be limited in her ability to independently manage more complex activities of daily living” and needed specialized services. *Id.* at 3.

Not only did the evaluations reveal Ms. Brown’s cognitive disability, DHHS workers openly acknowledged that she had a cognitive disability. As early as 2012, DHHS workers noted Ms. Brown’s “apparent limitations,” Order to take Child Into Protective Custody, 4/10/12 at 1, and “abnormal behavior.” Amended Petition,

¹⁶ Under the ADA, a “disability” is defined to include “a physical or mental impairment that substantially limits one or more major life activities.” 42 USC § 12102(1). Among the enumerated “major life activities” are “caring for oneself . . . learning, reading, concentrating, thinking, communicating, and working,” though the list is non-exhaustive. 42 USC § 12102(2). Mental impairments such as mental retardation and specific learning disabilities qualify as disabilities. 28 CFR 35.104(1).

4/18/12 at 3. Her initial service plan recognized that Ms. Brown “appears to have some intellectual impairments.” Initial Service Plan, 3/16/13 at 6. The plan further indicated that Ms. Brown has “difficulties in making decisions,” “a hard time understanding simple tasks,” and cannot write in complete sentences. *Id.* Cordell Huckaby, the DHHS worker who spoke with Ms. Brown on the day of Destiny’s removal, admitted that Ms. Brown told him that she had mental health issues. 1/28/13 Tr. at 18. At the preliminary hearing to remove Elijah, DHHS worker Jacqueline Baskerville acknowledged that Ms. Brown had emotional and cognitive impairments. 2/13/13 Tr. at 7. Similarly, hospital social worker Vernice Muldrew expressed concerns to DHHS workers about Ms. Brown’s cognitive abilities. Petition, 2/13/13 at 2.

Ms. Brown herself had informed DHHS that she was applying for SSI due to her mental impairment. *Id.* Her foster care worker, Yasmin Gibson, admitted that she was aware of Ms. Brown’s disabilities and recognized Ms. Brown’s difficulties with reading and writing. 8/13/14 Tr. at 10; 11/7/14 Tr. at 12. Ms. Gibson also acknowledged Ms. Brown’s intellectual disability, stating that she believed Ms. Brown’s “just borderline range of cognitive functioning” required “things to aid her in doing what is necessary.” 7/27/15 Tr. at 37. The trial court itself indicated that it believed Ms. Brown had cognitive delays. 10/15/13 Tr. at 6; 7/27/15 Tr. at 64. In short, there was no doubt among all the players in the case that Ms. Brown was a parent with a disability.

Not only did DHHS case workers know that Ms. Brown suffered from a cognitive disability, they also knew that she needed specific accommodations because of that disability. The psychological evaluation of Ms. Brown requested by DHHS recommended that DHHS provide behavioral therapy and parenting classes that utilized in-session role-playing, and instructed DHHS to administer measures of adaptive functioning to determine Ms. Brown's specific strengths and weakness with regards to activities of daily living. Juvenile Assessment Center Psychological Report, 5/9/13 at 4. Building on these recommendations, a psychiatric evaluation recommended that Ms. Brown receive case management services through a community mental health agency, like NSO or Community Link Incorporated, that specifically served individuals with disabilities. Juvenile Assessment Center Psychiatric Evaluation, 5/30/13 at 4. A third report indicated that Ms. Brown "could benefit [from] intensive services as evidenced by the client needing more time and support to complete treatment goals." Juvenile Assessment Center Court Report, 10/15/13 at 3.

Ms. Brown's attorney also reminded DHHS and the court of Ms. Brown's need for accommodations in at least six different hearings. 8/13/14 Tr. at 7-11; 11/7/14 Tr. at 11-12, 15; 11/26/14 Tr. at 7-8; 2/20/15 Tr. at 10-13; 5/20/15 Tr. at 9-11; 7/27/15 Tr. at 39. In January 2014, she asked a foster care worker from Wellspring Lutheran Services about one-on-one parenting help and an incremental health program. 1/15/2014 Tr. at 13-14. In August 2014, she continued to raise concerns that the service plan did not account for her client's needs. 8/13/14 Tr. at 7.

Counsel asked the worker about Ms. Brown's disabilities, and the worker confirmed that Ms. Brown indeed suffered from cognitive disabilities. 8/13/14 Tr. at 10. Still, when counsel asked about necessary assessments for these disabilities, the worker seemed confused, testifying, "the last thing that I know was needed was basically an assessment, like some type of psychological assessment, so I thought that we were getting that from the therapist because I don't have any." *Id.* at 7. At the conclusion of the hearing, counsel asked the court to order DHHS to refer Ms. Brown to a community-based program that assisted persons with developmental disabilities, notwithstanding the fact that DHHS' own psychologist had made such a recommendation over a year prior to the hearing. *Id.* at 15. Counsel extensively inquired about the referral at subsequent hearings to no avail. 11/7/14 Tr. at 11-12, 15; 11/26/14 Tr. at 7-8; 2/20/15 Tr. at 10-13; 5/20/15 Tr. at 9-11; 7/27/15 Tr. at 39.

There is no dispute that DHHS knew that Ms. Brown had a cognitive disability and required specialized services to accommodate that disability. The next section details DHHS' complete failure to provide her with those services as required by the law.

**B. DHHS FAILED TO MAKE REASONABLE EFFORTS TO REUNIFY
BECAUSE IT DID NOT CREATE A SERVICE PLAN THAT
ACCOMMODATED MS. BROWN'S DISABILITY.**

Standard of Review

Whether DHHS failed to make reasonable efforts to reunify is reviewed for clear error. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

Argument

As explained above, the ADA provide the lens through which courts should evaluate whether DHHS made reasonable efforts to reunify children with parents with disabilities. Here, despite having knowledge of Ms. Brown's cognitive disability and her need for accommodations, DHHS completely failed to provide the individualized services required by the law. First, the agency refused to provide Ms. Brown any services for the first nine months of the case, violating the legal requirement that it provide services within 30 days of a child's removal. MCL 712A.13a(10)(a). Then, despite knowing Ms. Brown had a cognitive disability, it drafted a service plan without first arranging for her to have a mental health evaluation. Finally, after these evaluations occurred, it ignored the specific recommendations made by its own psychological and psychiatric consultants. It did not provide her with behavioral therapy or a specialized parenting program that utilized role-playing. 8/13/14 Tr. at 11; 5/20/15 Tr. at 7; 7/27/15 Tr. at 44. It did not assess her with a measure of adaptive functioning. Nor did it arrange for her to obtain case management from a community mental health organization that works with individuals with developmental disabilities and could have assisted her with housing, employment and parenting. Though Ms. Brown's attorney repeatedly asked for specialized disability services at six different hearings, the caseworker never procured the services or even completed a referral. 8/13/14 Tr. at 10; 11/7/14 Tr. at 11; 11/26/14 Tr. at 6; 2/20/15 Tr. at 10-11; 5/20/15 Tr. at 10; 7/27/15 Tr. at 39-40. In fact, developmental disability services were available through Ms. Brown's

existing provider, yet Ms. Brown's caseworker did not even attempt to explore the existing services until May 2015, one month before the termination hearing.

5/20/15 Tr. at 10. Moreover, Ms. Brown's attorney requested one-on-one parenting help and a targeted program for disabled individuals, yet the DHHS worker failed to refer Ms. Brown for the services. 1/15/14 Tr. at 13-14; 7/27/15 Tr. at 44.

Instead, DHHS offered Ms. Brown a revolving door of caseworkers and service providers who provided her with a standard array of services, including the same therapy and parenting classes provided to any parent involved in the child welfare system. Ms. Brown complied with these services – attending over 60 therapy sessions, Juvenile Assessment Center Court Report, 11/17/14 at 1, and completing her parenting class – but she struggled to demonstrate enough benefit from these services to satisfy caseworkers. Her therapist reported that Ms. Brown was “fully engaged” in therapy sessions and successfully completed behavioral assignments. Updated Court Report, 10/15/13 at 4. Her therapist also noted that Ms. Brown was “making progress” and could benefit from more intensive services, but more intensive services were never provided. Juvenile Assessment Center Court Report, 10/15/13 at 2-3. One year later, with the same standard services, Ms. Brown “continue[d] to struggle” with goals in her service plan, like obtaining housing and employment. Juvenile Assessment Center Court Report, 11/17/14 at 2. Similarly, Ms. Brown, while showing improvement in some areas, struggled at times to demonstrate her ability to parent during parenting time. Updated Court Report, 10/15/13 at 4-5. While her provider for parenting classes asserted that Ms.

Brown was making some progress, she believed that Ms. Brown would need more time to complete the goals. Juvenile Assessment Center Court Report, 1/15/14 at 2. Instead, DHHS terminated Ms. Brown's parenting classes when she completed the standard program; unsurprisingly, the trial court noted that Ms. Brown "in more than a few ways has not benefitted." Order, 1/15/14 at 1.

Despite Ms. Brown's struggle to benefit from cookie-cutter services, the trial court admonished Ms. Brown's attorney when she requested specific accommodations, telling her that DHHS is not "in the business of taking parents by the hand" and "we're not dealing with children here." 8/13/14 Tr. at 16. So rather than provide her with appropriate services, the agency instead filed a petition to terminate her parental rights.

By refusing to provide her with services that accommodated her disability, DHHS set Ms. Brown up to fail. The agency denied her the opportunity to fully benefit from a tailored service plan, violating its legal obligations under both the ADA and MCL 712A.19a.

C. DHHS' FAILURE TO MAKE REASONABLE EFFORTS TO REUNIFY PRECLUDED THE TRIAL COURT FROM TERMINATING MS. BROWN'S RIGHTS.

Standard of Review

Interpretation and application of statutes and court rules are reviewed de novo. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

Argument

When DHHS fails to make reasonable efforts to reunify a parent with her children, it cannot demonstrate, by clear and convincing evidence, that a parent will never be able to safely care for a child. To terminate a parent's rights, the Juvenile Code requires DHHS to demonstrate that a parent not only abused or neglected a child in the past but will continue to do so into the future. For example, MCL 712A.19b(3)(c)(i) requires DHHS to prove that the adjudication conditions will not be rectified within a reasonable time. And MCL 712A.19b(3)(g) demands evidence that "there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time."¹⁷

To meet its heavy burden to show that a parent will be unable to safely care for her child in the future, DHHS must make reasonable efforts to reunify the family. "It is only when timely and intensive services are provided to families that agencies and courts can make informed decisions about parents' ability to protect and care for their children." *In re Rood*, 483 Mich at 98 (citing Michigan Dep't of Health and Human Services, *Children's Foster Care Manual* 722-05, at 10-11.). Thus, the individualized assessments, classes and services that the law requires DHHS to provide give the court the information it needs to evaluate whether the parent can provide a home for her child or whether her rights must be permanently extinguished. See *In re Mason*, 486 Mich at 162 (finding that because DHHS did

¹⁷ The trial court relied on MCL 712A.19b(3)(c)(i) and MCL 712A.19b(3)(g) to terminate Ms. Brown's parental rights. Order Following Termination of Parental Rights, 7/27/15.

not make reasonable efforts, it “failed to evaluate respondent’s parenting skills.”); *In re Rood*, 483 Mich at 116 (“Assessments of respondent and services aimed at reunifying [the father] with his daughter would have provided direct information concerning their relationship and its potential harm.”); *id.* at 127 (“DHS was statutorily obligated to investigate further to determine whether respondent could provide a safe custodial environment.”) (YOUNG, J., concurring).

Consistent with these findings, both this Court and the Court of Appeals have held that DHHS’ failure to make reasonable efforts precludes a trial court from terminating a parent’s rights.¹⁸ See *In re Rood*, 483 Mich at 118-19; *In re Mason*, 486 Mich at 159-60; *In re Newman*, 189 Mich App 61, 66; 472 NW2d 38 (1991). Such a failure creates a “hole in the evidence” that effectively “relieve[s] the

¹⁸ Appellate courts across the country have reversed termination of parental rights decisions where child welfare agencies have failed to make reasonable efforts to design service plans that accommodate a parent’s disability. See, e.g., *In re Victoria M*, 207 Cal App 3d at 1331 (reversing termination order because “the rights of a developmentally disabled parent may not be terminated without first assessing whether the services offered by the state through regional centers may enable the family of a disabled parent to remain intact.”); *Mary Ellen C v Arizona Dep’t of Econ Sec*, 193 Ariz 185, 192; 971 P2d 1046 (Ct App Az 1999)(reversing termination decision because the state cannot neglect “to offer the very services its consulting expert recommends.”); *In re Adoption/Guardianship Nos J9610436 & J9711031*, 368 Md 666, 682-83, 694; 796 A2d 778 (2002)(where state failed to offer “any specialized services designed to be particularly helpful to a parent with the intellectual and cognitive [disabilities]” and failed to “utilize services that might be available through the Developmental Disabilities Administration,” termination must be reversed because there was not clear and convincing evidence “that proper additional services could not bring about an adjustment that would permit reunification in the reasonable future.”).

state of its burden to prove the grounds for termination.” *In re Mason*, 486 Mich at 158, 166; *In re Rood*, 483 Mich at 127 (YOUNG, J., concurring). A parent cannot be faulted for “resulting factual gaps in the record.” *In re Rood*, 483 Mich at 117.

For example, in *Rood*, this Court reversed a termination of parental rights because DHHS failed to make reasonable efforts to reunify a father with his daughter. *Id.* at 115. Such efforts, which should have included home assessments and services, would have enabled DHHS and the court to determine whether the father was a fit parent. *Id.* at 116. Without reasonable efforts, however, the trial court did not have a full picture of the father’s current or future ability to provide a safe home for the child – there were “factual gaps in the record.” *Id.* at 117. The court was “left to merely assume” that placement would harm the child. *Id.* at 116. Similarly, in *Mason*, this Court found that because of DHHS’ failures to provide appropriate services to an incarcerated father, the request to terminate his parental rights was “premature.” *Mason*, 486 Mich at 169. And in *In re Newman*, the Court of Appeals reversed a termination petition because DHHS failed to provide specialized services to a parent with a cognitive disability. 189 Mich App at 66. The Court of Appeals concluded, “How then can we say there is no reasonable likelihood that the conditions in the home would not be rectified within a reasonable time when the one person who could have helped respondents remedy the conditions refused to do so?” *Id.* In each of these cases, courts found that absent the making of reasonable efforts, DHHS could not sustain its burden to prove grounds for termination by clear and convincing evidence.

The central message of these holdings is clear – when DHHS refuses to provide appropriate services to a family, it cannot meet its statutory burden to show that a parent will not be able to safely care for a child in the future. For example, if DHHS refers a parent who is deaf to a therapist who only communicates verbally, it cannot prove that the parent will never be able to remedy past mistakes. Or if a parent is blind and is referred to a parenting class where only visual instruction is provided, it cannot demonstrate that the parent cannot learn proper techniques. Or, as in this case, where a parent is cognitively impaired but DHHS fails to provide her with the specialized assistance recommended by the professionals it asked to evaluate her, such as behavioral therapy, or help from an organization that assists developmentally delayed individuals, DHHS cannot show that the parent can never address the problems that led to court involvement. When DHHS fails to provide the individualized services required by both MCL 712A.19a and the Americans with Disabilities Act, it cannot meet its heavy statutory burden to terminate a parent's rights.

CONCLUSION

For the foregoing reasons, Ms. Brown respectfully requests that this Court either deny the L-GAL's Application for Leave to Appeal or affirm the Court of Appeals' decision reversing the trial court's termination of parental rights order.

Respectfully submitted,

/s/ Vivek S. Sankaran

Vivek S. Sankaran (P68538)
Joshua B. Kay (P72324)
Child Welfare Appellate Clinic
Attorneys for Appellee-Mother
University of Michigan Law School
701 S. State St., 2023 South Hall
Ann Arbor, MI 48109-3091
(734) 763-5000
vss@umich.edu

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